

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

**1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006**

September 30, 1999

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

EAST ARKANSAS CONTRACTORS, INC. :

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Docket No. CENT 99-329-M

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

**ORDER**

BY: Jordan, Chairman; Riley and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On September 7, 1999, the Commission received from East Arkansas Contractors, Inc. ("EAC") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by EAC.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In the request, James Norman, president of EAC, asserts that EAC's failure to file a hearing request to contest the proposed penalty assessment was due to a change in personnel, resulting in mishandling of the notice of proposed penalty assessment. Mot. at 1. Norman submits that after EAC received the notice on July 10, 1999, it gave the notice to a technician from Environmental Data Services, a company which handles such matters for EAC. *Id.* Norman explains that the technician was terminated a few days later, and that EAC never recovered the original notice of proposed penalty assessment. *Id.* Norman further states that he called Harry Verdier, presumably, an MSHA official, explained the mishandling of the document to him, and was advised to request "proper documents" from the Civil Penalties Office with the

Department of Labor's Mine Safety and Health Administration ("MSHA"). *Id.* He claims he sent such a request to MSHA via facsimile on August 19, mailing a hard copy by registered mail.<sup>1</sup> *Id.* Norman requests that EAC be permitted to contest the violations in this case.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *Jim Walters Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *see also Rocky Hollow Coal Co., Inc.*, 16 FMSHRC 1931, 1932 (September 1994) (remanding to an administrative law judge where counsel for operator failed to timely submit notice of contest due to his misplacement of the file). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (September 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Del Rio, Inc.*, 19 FMSHRC 467, 467-68 (March 1997) (remanding for judge's consideration of operator's request to reopen penalty assessment after green card was misfiled in accounts payable file); *Eastern Associated Coal Corp.*, 19 FMSHRC 494, 494-95 (March 1997) (remanding operator's request to reopen final order when substitute mailroom employee failed to refer proposed assessment to legal department); *RB Coal Co., Inc.*, 17 FMSHRC 1110, 1110-11 (July 1995) (remanding for judge's consideration of operator's request to reopen penalty assessment after green card was misplaced among other penalty assessments that operator intended to pay).

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<sup>1</sup> Although Norman states that he enclosed a copy of his August 19 request to MSHA, no such copy was included with EAC's request to reopen.

On the basis of the present record, we are unable to evaluate the merits of EAC's position.<sup>2</sup> In the interest of justice, we remand the matter for assignment to a judge to determine whether EAC has met the criteria for relief under Rule 60(b). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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Mary Lu Jordan, Chairman

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James C. Riley, Commissioner

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Robert H. Beatty, Jr., Commissioner

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<sup>2</sup> In view of the fact that the Secretary does not oppose EAC's motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen conclude that the motion should be granted.

## Distribution

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